TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~508.~~ 58

PETER B. AMORY, PLAINTIFF IN ERROR,

vs.

SAMUEL B. AMORY & JOHN AMORY, EXECUTORS OF JAMES AMORY, DECEASED.

IN ERROR TO THE SUPERIOR COURT OF THE CITY OF NEW YORK.

FILED MARCH 27, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 508.

PETER B. AMORY, PLAINTIFF IN ERROR,

vs.

SAMUEL B. AMORY & JOHN AMORY, EXECUTORS OF JAMES AMORY, DECEASED.

IN ERROR TO THE SUPERIOR COURT OF THE CITY OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	1
Bond	5	2
Petition for writ of error	9	4
Remittitur	12	5
Summons	19	6
Complaint	20	7
Answer	22	8
Reply	29	10
Verdict	30	11
Judgment	31	11
Case and exceptions	33	11
Judgment	52	18
Notice of appeal to court of appeals	53	19
Opinion	54	19
Judgment	58	20
Notice of appeal	60	21
Judgment	65	22
Clerk's certificate	67	23

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the justices of the superior court of the city of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, being possessed of the record and proceedings upon a remittitur from the court of appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Samuel B. Amory and John Amory, as executors of the last will and testament of James Amory, deceased, and Peter B. Amory, action No. 1, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their
2 validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Peter B. Amory, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the twenty-third day of November, in the year of our Lord one thousand eight hundred and seventy-four.

Issued Nov. 23d, 1874.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

WARD HUNT,
Ass. Just. Sup. Ct. U. S.

(Indorsed:) U. S. Supreme Court. Peter B. Amory, plaintiff in error, vs. Samuel B. Amory and John Amory, as executors of the last will and testament of James Amory, deceased, defendants in error. Writ of error. Action No. 1. W. T. Birdsall, attorney for plff. in error, 150 Broadway, N. Y. Received Nov. 28, 1874.

3 UNITED STATES OF AMERICA, *ss:*

To Samuel B. Amory and John Amory, executors of the last will and testament of James Amory, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the superior court of the city of New York, wherein Peter B. Amory is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said court of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Ward Hunt, one of the justices of the Supreme Court of the United States, this twenty-third day of November, in the year of our Lord one thousand eight hundred and seventy-four.

WARD HUNT,
Associate Justice of the Supreme Court of the United States.

4 Service of a copy of the within citation, this 28th November, 1874, is hereby admitted.
Nov. 28th, 1874.

FULLERTON, KNOX & RUDD,
Attys. for Defts. in Error.

(Indorsed:) U. S. Supreme court. Peter B. Amory, plff. in error, agst. Samuel B. Amory and John Amory, exrs., &c., defts. in error. Action No. 1. Citation. Received Nov. 28, 1874.

5 Kno' all men by these presents that we, Peter B. Amory, of the city of Elizabeth, in the State of New Jersey, James W. Amory, of the city of New York, and John M. Amory, of said city, county, and State of New York, are held and firmly bound unto Samuel B. Amory and John Amory, executors of the last will and testament of James Amory, deceased, in the sum of twenty thousand dollars, to be paid to the said Samuel B. Amory and John Amory, executors, &c., as above, their successors or assigns, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the twenty-first day of November, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas Peter B. Amory, above named, hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered against him by the superior court of the city of New York, on a remittitur from the court of appeals of the State of New York, in an action wherein the said Samuel B. Amory and John Amory, as executors, &c., as aforesaid, were plaintiffs, and Peter B. Amory was defendant, which judgment was entered on the 21st day November, 1874,

6 for the sum of one hundred and seventeen $\frac{53}{100}$ dollars, and affirming a judgment of the general term of said superior court for ninety-two dollars and seventeen cents costs, and affirming a judgment of said superior court, entered June 6th, 1873, for the sum of ten thousand eight hundred and twenty-nine $\frac{96}{100}$ dollars damages and costs against said Peter B. Amory.

Now, therefore, the condition of this obligation is such that if the above-named Peter B. Amory shall prosecute said writ of error to effect, and answer all damages and costs which shall be awarded against him therein if he shall fail to make said plea good, then *then* this obligation shall be void; otherwise the same shall be and remain in full force and effect.

PETER B. AMORY. [SEAL.]
JAMES W. AMORY. [SEAL.]
JNO. M. AMORY. [SEAL.]

Sealed and delivered, and taken and acknowledged, this 21st day of November, 1874, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Peter B. Amory, being duly sworn, doth depose and say that he resides in the city of Elizabeth, Union County, State of New Jersey; that he is worth the sum of one hundred thousand dollars, over and above all his just debts and liabilities.

PETER B. AMORY.

7 Sworn to before me this 21st day of November, A. D. 1874.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

James W. Amory, being duly sworn, doth depose and say that he resides in the southern district of New York; that he is worth the sum of thirty-five thousand dollars, over and above all his just debts and liabilities.

JAMES W. AMORY.

Sworn to before me this 21st day of November, A. D. 1874.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

John M. Amory, being duly sworn, doth depose and say that he resides in the southern district of New York; that he is worth the sum of fifty thousand dollars, over and above all his just debts and liabilities.

JNO. M. AMORY.

Sworn to before me this 21st day of November, A. D. 1874.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

8 This bond approved as to form and amount and sufficiency of surety.

Dated Nov. 23d, 1874.

WARD HUNT,
Ass. Just. Sup. Ct. U. S.

I certify that the within-named principal and surety have justified before me, and am satisfied of their responsibility for the amounts named.

Dated N. Y., Nov. 21st, 1874.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

(Indorsed:) U. S. Supreme Court. Peter B. Amory, plaintiff in error, agst. Samuel B. Amory and John Amory, executors, &c., defendants in error. Action No. 1. Bond on writ of error.

9 Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, AS EXECUTORS of the last will and testament of James Amory, deceased, *agst.* PE'R B. AMORY. } Actions Nos. 1 & 2.

To the honorable Ward Hunt, associate justice of the Supreme Court of the United States:

The petition of the above-named Peter B. Amory respectfully represents that he feels himself aggrieved by the final judgment of the superior court of the city of New York, rendered on the 21st day of November, 1874, on a remittitur from the court of appeals of the State of New York, said court of appeals being the highest court of law or equity in said State in which a decision can be had in the above-entitled action, and he has no right to have a writ of error, except by the special allowance of one of the justices of the Supreme Court, and being desirous to sue out a writ of error to the Supreme Court of the United States, he herewith submits for inspection the record of said suit, by which it is manifest that the errors complained of involve questions of
10 law of such extensive interest and operation as to render the final decision thereof by the Supreme Court desirable. The questions involved in both actions are identical. It will appear from the record that the questions involved in this controversy involves the construction of various clauses of the Constitution as well as the statutes of the United States providing for the removal of causes from the State to Federal jurisdiction when the action is between citizens of different States.

Wherefore your petitioner prays that your honor will allow the two writs of error prayed for as by statute in such case made and provided.

And your petitioner will ever pray, &c., as in duty bound.

PETER B. AMORY,
By W. T. BIRDSALL,
His Attorney.

11 New York court of appeals.

SAMUEL B. AMORY AND ANOTHER, RESPONDENTS, *vs.* PETER B. AMORY, APPELLANT. } No. 1. Case and exceptions on appeal.

Geo. E. Horne, appellant's attorney; Fullerton, Knox & Rudd, respondents' attorneys.

12 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the court in the capitol in the city of Albany, on the 10th day of Nov., in the year of our Lord one thousand eight hundred and seventy-four, before the judges of said court.

Witness the Hon. Sanford E. Church, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur, Nov. 1?, 1874.

SAMUEL P. AMORY & OR., EXTRS., &C., RESPONDENT',
vs.
PETER B. AMORY, APPELLANT.

Be it remembered that on the 14' day of March, in the year of our Lord one thousand eight hundred and seventy-four, Peter B. Amory, the appellant in this action, came here into the court of appeals,
13 by George E. Horne, his attorney, and filed in the said court a notice of appeal, and return thereto, from the judgment of the general term of the New York superior court, and James B. Amory and ors., the respondents in said action, afterwards appeared in said court *court* of appeals by Fullerton, Knox & Rudd, their attorneys, which said notice of appeal, and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals having heard this cause duly argued by W. T. Birdsall, of counsel for appellants, and by Henry E. Knox, for respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the New York superior court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said N. Y. superior court,
14 there to be proceeded upon according to law. Therefore it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon as well *as* the notice of appeal and return thereto aforesaid, as the judgment of the court of appeals aforesaid by them given in the premises, by the said court of appeals remitted into the New York superior court of the city of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said superior court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, Nov. 13, 1874.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.
15 [COURT OF APPEALS SEAL.] E. O. PERRIN, *Clerk.*

16 Superior court of the city of New York.

SAMUEL B. AMORY AND ANOTHER, RESPONDENT',
against
PETER B. AMORY, APPELLANT.

Clerk's office, superior court of the city of New York.

I, Thomas Boese, clerk of the superior court of the city of New York,

having compared the annexed copies, notice of appeal to the court of appeals, and judgment-roll in the above-entitled action, with the originals on file in this office, do certify that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof I have hereunto subscribed my name and affixed the seal of the superior court of the city of New York this 4th day of March, A. D. 1874.

[SEAL.] THOMAS BOESE, *Clerk.*

17 Superior court of the city of New York.

SAMUEL B. AMORY AND ANOTHER, RESPONDENTS, *vs.* PETER B. AMORY, APPELLANT.

Clerk's office superior court of the city of New York.

I, Thomas Boese, clerk of the superior court of the city of New York, having compared the annexed copy, judgment-roll, and notice of appeal to the court of appeals in the above-entitled action with the originals on file in this office, do certify that the same are correct transcripts therefrom, and of the whole of such originals.

In witness whereof I have hereunto subscribed my name and affixed the seal of the superior court of the city of New York this 4th day of March, A. D. 1874.

[L. S.] THOMAS BOESE, *Clerk.*

18 Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased, *vs.* PETER B. AMORY. No. 1.

Take notice that the defendant appeals to the general term of this court from the judgment entered herein on the 6th of June, 1873, in favor of the plaintiffs, against the defendant, for the sum of ten thousand eight hundred and thirty-three and $\frac{96}{100}$ dollars, and from every part thereof.

New York, June 6, 1873.

Yours, etc.,

GEO. E. HORNE,
Atty. for Defendant and Appellant.

To THOS. BOESE,
Clerk for said Superior Court.
To FULLERTON, KNOX & RUDD, Esqs.,
Plaintiffs' Attorneys.

19 Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased, plaintiffs, *against* PETER B. AMORY, DEFENDANT. Summons for a money demand on contract. Action No. 1.

To the above-named defendant:

You are hereby summoned and required to answer the complaint in

this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers, at their office, No. 11 Pine street, in the city of New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of six
20 thousand two hundred and twenty-nine dollars and fourteen cents, with interest from the tenth day of June, one thousand eight hundred and sixty-three, besides the costs of this action.

Dated New York, August 11, 1870.

FULLERTON, KNOX & RUDD,
Plaintiffs' Attorneys, 11 Pine street, N. Y.

Superior court of the city of New York.

CITY AND COUNTY OF NEW YORK:

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased, plaintiffs,
against
PETER B. AMORY, DEFENDANT.
} No. 1.

21 The complaint of the above-named plaintiffs against the above-named defendant respectfully shows to the court as follows, that is to say:

That on the 10th day of June, in the year 1863, at the said city of New York, the said defendant made and executed under his hand a certain promissory note in writing, bearing the last-mentioned date, whereby, six months after the date thereof, he promised to pay to the order of James Amory six thousand two hundred and twenty-nine dollars and fourteen cents, for value received, with interest, and then and there for value delivered the same to the said James Amory, who thereupon became the owner and lawful holder thereof, and so remained until his death, as hereinafter mentioned, and that though the monies agreed by said note to be paid became due and payable during the life-time of the said James Amory, yet the said defendant did not pay the same, or any part thereof, to the said James Amory, nor has the same, or any part thereof, been paid, and the said defendant still remains indebted therefor.

That the said James Amory died on or about the sixteenth day of August, in the year 1868, and that after his death, and on or about the twentieth day of June, in the year 1870, by the surrogate of the county of New York, to whom full jurisdiction and authority in that behalf of right belonged, letters testamentary, bearing the last-mentioned date, of the last will and testament of the said James Amory, deceased,
22 were duly granted and issued to the said plaintiffs, who thereupon accepted the administration of said estate, and still remain the executors of said will.

That by virtue of said letters, the said plaintiffs became and are authorized and empowered to collect and recover the monies due and payable on said promissory note, which monies are part of the goods, chattels, and credits of said estate.

Wherefore the said plaintiffs demand, as such executors, judgment against the said defendant in the sum of six thousand two hundred and twenty-nine dollars and fourteen cents, together with interest thereon from June 10, 1863, besides the costs of this action.

FULLERTON, KNOX & RUDD,
Attorneys for Plaintiffs.

Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased,
against
PETER B. AMORY.
} Action No. 1.

The answer of the defendant Peter B. Amory to the plaintiffs' complaint herein shows to the court— 23

First. That he denies each and every allegation in the complaint contained, except as hereinafter specifically admitted.

Second. That he admits the formal execution and delivery of the promissory note set forth in said complaint, and the death of the said James Amory on or about the day therein specified.

Third. That he denies that the plaintiffs have or ever had any authority or right whatever, by virtue of any letters testamentary, or of any alleged appointment as executors of the last will and testament of James Amory, deceased, or otherwise, to collect or recover the said note or any monies that may be due thereon.

Fourth. That the said James Amory was at the time of his death a resident of the State of Wisconsin; that he died intestate and without lawful issue, leaving him surviving his widow, Angelina Amory, who is still living and a resident of the State of New York; that the said Angelina, as such widow, under the laws of this State and of the State of Wisconsin, became and was upon the death of the said James Amory, the owner of the said promissory note or claim set forth in the complaint, and lawfully entitled thereto; and that as such owner 24 and heir of the said James Amory, deceased, the said Angelina, prior to the commencement of this action, executed and delivered to this defendant, under her hand and seal, a release and discharge of this defendant therefrom, and from all claim and liability thereunder; and that the said plaintiffs are not the real parties in interest in this action, nor are they, nor is either of them, an executor, or an administrator, or trustee of an express trust, nor a person authorized by statute to sue without joining with him the person for whose benefit the suit is prosecuted.

FIRST COUNTER-CLAIM.—And for a first counter-claim to the cause of action alleged in the complaint, the defendant shows to the court:

That on or about the first day of October, 1856, and before the commencement of this action, at the city of New York, this defendant sold and delivered to the said James Amory, at his request, goods, wares, and household furniture, for which the said James Amory promised to pay the sum of one thousand dollars, which sum thereupon became due therefor from him to this defendant; and that no part thereof has ever been paid, but that the said James Amory, at the time of his death, was justly indebted therefor; and that his estate and the plaintiffs, as the alleged executors of the last will and testament of the said James Amory, deceased, and as the administrators of the said estate, are now justly indebted therefor to the defendant in the sum of one thousand dollars, with interest from October 1, 1856.

SECOND COUNTER-CLAIM.—And for a second counter-claim to the cause of action alleged in the complaint, the defendant shows to the court: 25

That on different days between the first day of May, 1855, and the first

day of January, 1863, and before the commencement of this action, in part at the city of New York, in the State of New York, and in part at the city of Fon' du Lac, in the State of Wisconsin, the defendant lent to the said James Amory, on condition that the same should be repaid on demand, with interest, different sums of money, amounting in all to the sum of one thousand three hundred and twenty-five and $\frac{25}{100}$ dollars; that the defendant, on or about the first day of January, 1863, duly demanded payment of the same from the said James Amory, but no part thereof has ever been paid; and that the said James Amory, at the time of his death, was justly indebted therefor, and that his estate and the plaintiffs, as the alleged executors of the last will and testament of the said James Amory, deceased, and as the administrators of the said estate, are now justly indebted therefor to the defendant in the sum of one thousand three hundred and twenty-five and $\frac{25}{100}$ dollars, with the interest from January 1, 1863.

THIRD COUNTER-CLAIM.—And for a third counter-claim to the cause of action alleged in the complaint, the defendant shows to the court:

26 That *no* different days between the first day of April, 1858, and the first day of January, 1864, and before the commencement of this action, in part at the city of New York, in the State of New York, and in part in the State of Wisconsin, this defendant paid to the use of the said James Amory, at his request, and on condition that the same should be repaid on demand, different sums of money, amounting in all to the sum of one thousand three hundred and fourteen and $\frac{55}{100}$ dollars, in paying witness and counsel fees, assessments, taxes, premiums of insurance, land-office fees, and other indebtedness of the said James Amory, to divers persons; that this defendant, on or about the first of January, 1864, duly demanded payment of the same from the said James Amory, but no part thereof has ever been paid, and that the said James Amory, at the time of his death, was justly indebted therefor, and that his estate, and the plaintiffs as the alleged executors of the last will and testament of the said James Amory, deceased, and as the administrators of the said estate, are now justly indebted therefor to the defendant in the sum of one thousand three hundred and fourteen and $\frac{55}{100}$ dollars, with interest from January 1, 1864.

FOURTH COUNTER-CLAIM.—And for a fourth counter-claim to the cause of action alleged in the complaint, the defendant shows to the court:

27 That on or about the first day of May, 1859, prior to the commencement of this action, the said James Amory was indebted to this defendant in the sum of one hundred and twelve and $\frac{80}{100}$ dollars for moneys belonging to the defendant had and received by the said James Amory, on or about that day, at the city of New York, to the use and for the benefit of said defendant, from one Gough and from one Burtus; that on or about the said first day of May, 1859, the defendant duly demanded payment of said monies from the said James Amory, but that no part thereof has ever been paid; and that the said James Amory, at the time of his death, was justly indebted therefor, and that his estate and the plaintiffs, as the alleged executors of the last will and testament of James Amory, deceased, and as the administrators of the said estate, are now justly indebted therefor to the defendant in the sum of one hundred and twelve and $\frac{80}{100}$ dollars, with interest from May 1, 1859.

FIFTH COUNTER-CLAIM.—And for a fifth counter-claim to the cause of action alleged in the complaint, the defendant shows to the court:

That on the first day of August, 1868, and before the commencement

of this action, the said James Amory was indebted to this defendant in the sum of five hundred and fifty dollars for board and lodging furnished and provided to the said James Amory by his defendant, at his
28 request, at different times between the first day of January, 1855, and the first day of August, 1868, in part at the city of New York, and in part at the city of Elizabeth, in the State of New Jersey, and for medicines, wines, liquors, fruits, carriage-hire, and other luxuries furnished and provided to the said James Amory during the said period, at the like request and at the said places, which sum became due to this defendant therefor from the said James Amory on or before the said first day of August, 1868, and that no part thereof has ever been paid, but that the said James Amory, at the time of his death, was justly indebted therefor, and that his estate, and the plaintiffs, as the alleged executors of the last will and testament of the said James Amory, deceased, and as the administrators of the said estate, are now justly indebted therefor to the defendant in the said sum of five hundred and fifty dollars, with interest from the first day of August, 1868.

Wherefore the defendant demands judgment that the plaintiffs' complaint herein may be dismissed with costs; and that defendant may have judgment against the estate of the said James Amory, deceased, and against the plaintiffs as executors of the last will and testament of the said James Amory, deceased, for the sum of four thousand three hundred and two dollars and sixty cents, with interest on $1,000 thereof from October 1st, 1856; and on $1,325.25 thereof from January 1st, 1863; and on
29 $1,314.55 thereof from January 1st, 1864; and on $112.80 thereof from May 1st, 1859; and on $550, remainder thereof, from August 1st, 1868, and costs.

GEO. E. HORNE,
Defendant's Attorney, 26 *Pine street, N. Y.*

Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased, *against* PETER B. AMORY.	Action No. 1.

The reply of the above-named plaintiffs to so much of the answer of said defendant as purports to constitute a counter-claim or counter-claims against the plaintiffs' cause of action, respectfully shows to the court as follows, to wit:

30 First. They allege that they have no knowledge or information sufficient to form a belief as to any of the allegations in said answer purporting to constitute such counter-claim or counter-claims, and they therefore deny each and every of said allegations and every part thereof.

Second. And for a further and separate defence, the said plaintiffs allege that the several alleged counter-claims did not, nor did any of them, nor any part thereof, which are in said answer designated respectively as first, second, third, and fourth counter-claim, accrue to the said defendant at any time within six years next before the death of the said James Amory.

Wherefore they demand judgment, as already prayed for in said complaint.

FULLERTON, KNOX & RUDD,
Attorneys for Plaintiffs.

At a trial-term of the superior court of the city of New York, held at the city-hall, in the city of New York, on the 4th day of June, A. D. 1873:

Present, Judge John Sedgwick.

Fullerton, Knox, &c.; Geo. E. Horne.

SAMUEL B. AMORY AND OTHERS, EXECUTORS, *against* PETER B. AMORY. } Verdict No. 1393.

31 Under the direction of the court, the jury say that they find a verdict for plaintiffs, and assess the damages at the sum of $10,582\frac{38}{100}$.

An extra allowance of $100 to plaintiffs.

(Extract from the minutes.)

THOMAS BOESE, *Clerk.*

Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased, *agst.* PETER B. AMORY. } Judgment, June 6, 1873. No. 1.

The issues in this action having been brought on for trial before Mr. Justice Sedgwick and a jury on the 4th day of June, A. D. 1873, and the issues having been tried and a verdict for plaintiffs having been duly rendered on the 4th day of June, A. D. 1873, for the sum of ten
32 thousand five hundred and eighty-two dollars and thirty-eight cents damage, and their costs having been adjusted at two hundred and fifty-one dollars and fifty-eight cents:

Now, on motion of Fullerton, Knox & Rudd, attorneys for said plaintiffs, it is adjudged that said plaintiffs recover of said defendant ten thousand five hundred and eighty-two dollars and thirty-eight cents damages, found by the jury, with two hundred and fifty-one dollars and fifty-eight cents costs, disbursements, and allowances, amounting in the whole to the sum of ten thousand eight hundred and thirty-three dollars and ninety-six cents.

THOMAS BOESE, *Clerk,*

From this judgment the defendant duly appealed, and for the purpose of sustaining his appeal has prepared the following

33 *Case and exceptions.*

Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased, respondents, *vs.* PETER B. AMORY, APPELLANT. } Action No. 1.

This action was commenced by service of the summons and complaint on the defendant, whose answer was served on the 20th day of

August, 1870. The plaintiffs served their reply to the counter-claims contained in the answer on the 19th day of October, 1870.

Copies of the pleadings are contained in the judgment-roll, which is hereto attached, and which forms a part of this case.

34 The action came on to be tried at a special term for the trial of issues of fact, at the court-house in the city of New York, on the 4th day of June, 1873, before the Honorable John Sedgwick, judge, and a jury; whereupon the following proceedings were had:

Before entering upon a trial, the defendant's counsel objected to the court proceeding further in the case upon the ground that it had no jurisdiction in the action, and, to sustain his objection, introduced the files of the court, and presented to the presiding judge, a petition, affidavit, and undertaking an order to show cause, upon which a motion had therefore been made to remove this cause into the circuit court of the United States, copies of which are hereto annexed, marked "Defts.'s Exhibits A;" and, also, the order denying such application, a copy of which is hereto annexed, marked "Defendant's Exhibit B."

The plaintiff's counsel thereupon introduced from the files of the court, and presented to the judge, the papers read on the hearing upon the above order, to show cause in behalf of the plaintiffs, copies of which are hereto annexed, marked "Plff.s' Exhibit No. 1."

The defendant's counsel objected to the last-mentioned paper being received or read. His objections was overruled, the papers were admitted, and the defendant duly excepted.

35 The court thereupon overruled the defendant's objection above stated to the jurisdiction of the court, and to this ruling the defendant duly excepted.

The plaintiffs then offered in evidence letters testamentary, issued by the surrogate of New York County to the plaintiffs.

The defendant duly objected, upon the ground of want of jurisdiction in this court; his objection was overruled, and he thereupon duly excepted.

Copies of the said letters are hereto annexed, and marked "Plaintiffs' Exhibit No. 2."

The plaintiff then called as a witness:

MALCOLM GRAHAM, who was sworn, and testified as follows:

I have computed the interest upon the note set out in the complaint to the present date; the principal is $6,229.14; interest, $4,353.24; total, $10,582.38.

To this evidence the defendant duly objected, upon the ground that this court had no jurisdiction in this case; his objection was overruled, and he duly excepted.

The plaintiffs then rested.

36 The defendants then put in evidence, from the files of this court, the petition, affidavit, and undertaking on the part of the defendant, used upon his application to remove this cause into the circuit court of the United States, and the order to show cause therein, theretofore offered in the case, copies of which are hereto annexed, marked "Deft.'s Exhibits A;" and the order denying such application, a copy of which is hereto annexed, marked "Deft.'s Exhibit B."

Plaintiffs also offered in evidence the opposing papers, used on such application in their behalf, copies of which are hereto annexed, marked "Plaintiffs' Exhibit No. 1."

The defendant duly objected to the same; his objection was overruled, and he duly excepted.

No further evidence or testimony was introduced, and thereupon the court directed the jury to find a verdict for the plaintiffs for $10,582.38, and verdict was entered accordingly; to which direction, ruling, decision, and verdict the defendant duly excepted.

On the 6th day of June, 1873, the plaintiffs entered judgment against the defendant, in accordance with such verdict, as appears by the judgment-roll, hereto attached.

37 The defendant excepts to the various and several rulings, directions, and decisions of the court as aforesaid, and to the said verdict, upon the ground that the same are, and that each of them is, contrary to the law, and that they are *are* not, and that each of them is not, sustained by the law and the evidence in the case.

GEO. E. HORNE,
Attorney and Counsel for Appellant.

DEFT.'S EXHIBITS A.

New York superior court.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased,
against
PETER B. AMORY. } No. 1.

To the honorable the superior court of the city of New York:

The undersigned, defendant in the above-entitled action, respectfully petition and shows:

38 That he is a resident and citizen of the State of New Jersey; that the above-named plaintiffs have brought this action as executors of the last will and testament of James Amory, deceased, under and by virtue of letters testamentary, granted and issued to them, the said plaintiffs, by the surrogate of the county of New York, in the State of New York; that said plaintiffs, as such executors, are citizens of the State of New York.

That the above action is brought to recover the sum of six thousand two hundred and twenty-nine $\frac{14}{100}$ dollars, being matter of dispute exceeding five hundred dollars, exclusive of costs. And your petitioner further shows, and offers the annexed bond as good and sufficient security for the removal of this cause into the next circuit court of the United States for the southern district, in second circuit, of the State of New York, being the circuit court held in the district where this action or suit is pending; and also for his entering in such court, on the first day of its next session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause or suit concerning him; and also for his there appearing and entering special bail in the cause, if special bail was originally required therein, pursuant to act of Congress entitled "An act for the removal of causes in certain cases from State courts," approved April 27, 1866, and the

39 act amendatory of said act, and doing such other appropriate acts as are thereby required to be done.

And your petitioner will ever pray.

PETER B. AMORY.

CITY AND COUNTY OF NEW YORK, *ss:*

Peter B. Amory, being sworn, says that he is the petitioner above

named, and who subscribed to said petition; that he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge.

PETER B. AMORY.

Sworn to before me this 30th day of April, 1873.

W. H. WINTERS,
Notary Public, N. Y. County.

40 Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased, *against* PETER B. AMORY. } No. 1.

CITY AND COUNTY OF NEW YORK, *ss:*

Peter B. Amory, being duly sworn, says that he is the defendant above named, and is a citizen of the United States, and of the State of New Jersey, wherein he resides; that the above-named plaintiffs are, under and by virtue of the laws of the State of New York, citizens of the State of New York; that this action is brought to recover the sum of six thousand two hundred and twenty-nine $\frac{14}{100}$ dollars, which sum is the matter in dispute, and exceeds the sum of five hundred dollars, exclusive of costs; and this deponent further says that he has reasons to and does believe that, from prejudice or local influence, he will not be able to obtain justice in this court.

PETER B. AMORY.

Sworn to before me this 30th day of April, 1873.

W. H. WINTERS,
Notary Public, N. Y. County.

41 Know all men by these presents, that we, Peter B. Amory, of Elizabeth, in the State of New Jersey, as principal, and Welcome R. Beebe, of the city, county, and State of New York, as surety, are held and firmly bound unto Samuel B. Amory and John Amory, executors of the last will and testament of James Amory, deceased, in the sum of ten thousand dollars, lawful money of the United States, to be paid to the said Samuel B. Amory and John Amory, executors of the last will and testament of James Amory, deceased, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the 30th day of April, in the year of our Lord one thousand eight hundred and seventy-three, (A. D. 1873.)

Whereas the above-named Samuel B. Amory and John Amory, executors of the last will and testament of James Amory, deceased, have brought an action in the superior court of the city of New York, in the State of New York, against the above-bounded Peter B. Amory, under and by virtue of letters testamentary granted and issued to them, the said Samuel B. Amory and John Amory, by the surrogate of the county of New York, in the State of New York, to recover the sum of six thousand two hundred and twenty-nine 14-100 dollars, together with the in-
42 terest thereon, from the 10th day of June, 1863, besides the cost of said action, being a matter in dispute exceeding five hundred dollars.

And whereas the said plaintiffs are citizens of the State of New York, and the said Peter B. Amory is a citizen of the State of New Jersey, and is desirous of removing said cause or suit into the next circuit court of the United States, to be held in the district where said suit is pending, pursuant to the acts of Congress in such case made and provided:

Now, therefore, the condition of this obligation is such that if the said Peter B. Amory shall enter in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do such other appropriate acts as by the act of Congress entitled "An act for the removal of causes in certain cases from State courts," approved July 27th, A. D. 1866, and the acts amendatory thereof, as are required to be done upon the removal of a suit into the United States court, then this obligation to be void; otherwise to be in full force and effect.

PETER B. AMORY. [SEAL.]
W. R. BEEBE. [SEAL.]

CITY AND COUNTY OF NEW YORK, *ss:*

Welcome R. Beebe, being duly sworn, says that he executed the foregoing bond as surety, and is a resident and freeholder in the city
43 of New York, and is worth the sum of twenty thousand dollars over and above all his debts and liabilities, and property exempt by law from execution.

W. R. BEEBE.

Sworn to before me this 30th day of April, 1873.

THOS. E. CUFF,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 30th day of April, A. D. 1873, personally came and appeared Peter B. Amory and Welcome R. Beebe, to me known to be the persons described in and who executed the foregoing instrument, and 'knowledged to me that they executed the same for the uses and purposes therein mentioned.

THOS. E. CUFF,
Notary Public, N. Y. Co.

Upon the foregoing petition, affidavit, and bond, let the plaintiffs herein, or their attorneys, show cause before me, or one of the justices of this court, at a special term thereof, to be held at chambers in the new city-hall, at the city of New York, on the 5th day of May inst., at
10 o'clock in the morning of such day, why the foregoing bond
44 should not be accepted and approved by this court as good and sufficient surety on the removal of this suit, or cause, or action into the circuit court of the United States, to be held in this district, (to wit, where said suit is pending,) and also why this suit should not be removed into said U. S. circuit court, and all proceedings therein in this court be stayed, pursuant to the acts of Congress in such case made and provided.

Dated New York, May 2, 1873.

JNO. SEDGWICK, *Judge.*

PLFFS.' EXHIBIT No. 1.

New York superior court.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased,
against
PETER B. AMORY.
} No. 1.

The above-named plaintiffs, in reply to the petition of Peter B.
45 Amory for the removal of this cause into the circuit court of the United States for the southern district of New York, and by way of showing cause under the order of May 2, 1873, herein, state and show to the court that the said James Amory, deceased, in whose right and as whose executors the plaintiffs sue, at the time of his death was a resident and citizen of the State of Wisconsin, to wit, on the 16th day of August, 1868, at the city and county of Fon' du Lac, in said State. That the last will and testament of said James Amory was duly admitted to probate in the county court of Fon' du Lac County, Wisconsin, in which county he resided at the time of his death on the 18th day of December, A. D. 1868, and letters testamentary thereon were duly issued by said court to these plaintiffs, they having been appointed in and by said will the executors thereof. That in addition to the real and personal estate, in Wisconsin, which the said James Amory owned at the time of his death, he also owned a considerable amount of real estate in the city and State of New York, and that afterwards his said will was propounded as a foreign will for probate before the surrogate's court in and for the city and county of New York, and was duly proved before and admitted to probate by said court on the 27th day of May, A. D. 1870, and letters testamentary thereon were issued by said surrogate's court to the plaintiffs in this action, who duly qualified as such,
46 both of whom then resided and still reside in the city of Fon' du Lac, in the county of Fon' du Lac, and State of Wisconsin, and that they then were, and ever since then and for more than eight years last past have been and still are, citizens of the State of Wisconsin, residing therein as aforesaid, and not citizens of the State of New York. That the only foundation or pretence for the allegation in said petition and annexed affidavit that they are citizens of the State of New York consists in the fact that letters testamentary were issued to them by said surrogate's court as aforesaid, and that they qualified as such executors under the same.

SAMUEL B. AMORY.
JOHN AMORY,
By SAMUEL B. AMORY.

CITY AND COUNTY OF NEW YORK, *ss:*

SAMUEL B. AMORY, above named, being duly sworn, says that he has read the foregoing answer, and that the same is true in all respects of his own personal knowledge.

SAMUEL B. AMORY.

Sworn and subscribed before me May 5th, 1873.

HENRY DOWNE,
Notary Public, New York County.

47 DEFT.'S EXHIBIT B.

Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, dec'd, *against* PETER B. AMORY. } Case No. 1.

The defendant's application to remove this cause into the circuit court of the United States for the southern district of New York came on to be heard on his petition and affidavit thereto annexed, together with the bond accompanying the same, persuant to the order of Mr. Justice Sedgwick, and adjournments of the hearing to this day; and upon reading and filing the verified reply to said petition, defendant's counsel having objected to the reading of any affidavits or reply on the part of plaintiffs controverting the matters set forth in the moving petition and affidavit, and having excepted to the ruling whereby the same were admitted and read; and upon hearing Mr. Birdsall, counsel for the defendant, it appearing to the satisfaction of this court that the bond
48 offered by the defendant herein is good and sufficient surety; and upon hearing Mr. Fullerton, counsel for the plaintiffs—

It is ordered that said application be, and the same is hereby denied, with ten dollars costs of motion to plai'tiffs to abide the event.

Dated May 9th, 1873.

(A copy.)

THOS. BOESE, *Clerk.*

PLFF.'S EXHIBIT NO. 2.

The people of the State of New York, by the grace of God free and independent, to all whom these presents shall come or may concern, send greeting:

Know ye, that at the county of New York, on the twentieth day of June, in the year of our Lord one thousand eight hundred and seventy, before Robert C. Hutchings, esq., surrogate of our said county, the last will and testament of James Amory, late of Fond du Lac, Wisconsin, deceased, was proved and is now approved and allowed by us; and the said James Amory not being, at or immediately previous to his
49 death, an inhabitant of the State of New York, but leaving assets in the county of New York, by means whereof the proving and registering said will, and the granting administration of all and singular the goods, chattles, and credits of the said testator, and also the auditing, allowing, and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattles, and credits of the said deceased, and any way concerning his will, is granted unto Samuel B. Amory and John Amory, both of Fond du Lac, State of Wisconsin, the executors in the said will named, they being first duly sworn, faithfully and honestly to discharge the duties of such executor.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto annexed.

Witness Robert C. Hutchings, esq., surrogate of our said county, at the city of New York, the twentieth day of June, in the year of our Lord

one thousand eight hundred and seventy, and of our Independence the ninety-

[L. S.] ROBERT C. HUTCHINGS, *Surrogate.*

50 Superior court of the city of New York.

SAMUEL B. AMORY AND ANOTHER, EXECUTORS, &c.,
against
PETER B. AMORY. } No. 1.

I, Thomas Boese, clerk of the Superior court, do hereby certify that the case and exceptions in the above-entitled action, as settled by the judge who tried the cause, were duly filed in this office on the 29th day of September, 1873.

In witness whereof I have hereunto subscribed my name and affixed the seal of the superior court of the city of New York, this 30th day of September, A. D. 1873.

[L. S.] THOMAS BOESE, *Clerk.*

51 At a general term of the superior court of the city of New York, held at the city hall, in said city, on the thirty-first day of December, A. D. 1873.

Present, Chief-Justice Barbour and Justices Van Vorst and Curtis.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS, &c., of James Amory, deceased,
vs.
PETER B. AMORY. } No. 1.

This cause having come on to be heard on the appeal from the judgment entered herein on the sixth day of June, 1873, and after hearing Henry E. Knox, esq., of counsel for the plaintiffs, and George E. Horne, esq., of counsel for the defendant, it is

Ordered, That the judgment entered herein on the sixth day of June, 1873, be and the same is hereby affirmed with costs to the plaintiffs.

Enter.

H. C. V. V.

52 Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased,
vs.
PETER B. AMORY.

Judgment, Feb. 4, 1874.

This cause having come on to be heard on the appeal from the judgment entered herein on the sixth day of June, 1873, and the court, after hearing the argument of counsel, as well for the defendant as for the plaintiffs, having ordered that said judgment be affirmed with costs to the plaintiffs, and the costs, disbursements, and allowances having been adjusted by the parties, now, on motion of Henry E. Knox, esq., of counsel for the plaintiffs, it is considered, ordered, and adjudged, that

the judgment entered herein on the sixth day of June, A. D. 1874, be, and the same is hereby, affirmed; and it is further considered, ordered, and adjudged that the plaintiffs above-named have and recover of
53 and from the defendant the sum of one hundred and nineteen dollars and ninety-two cents, their costs and disbursements and allowances herein.

THOMAS BOESE, *Clerk.*

Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, executors of the last will and testament of James Amory, deceased,
against
PETER B. AMORY. } No. 1.

Please take notice that the defendant, Peter B. Amory, appeals to the court of appeals from the judgment of the general term of the superior court of the city of New York, in this action, entered on the 4th day of February, 1874, affirming the judgment entered herein on the 6th day of June, 1873, and for the sum of one hundred and nineteen dollars and ninety-two cents, costs, disbursements, and allowances in favor of
54 the plaintiffs, against the defendant, and from every part thereof.

N. Y., February 5, 1874.

Yours, etc.,

GEO. E. HORNE,
Defendant's Attorney, 110 *Broadway, N. Y.*

To FULLERTON, KNOX & RUDD, Esqs.,
Plaintiffs' Attorneys.

THOMAS BOESE, Esq.,
Clerk of said superior court.

AMORY *vs.* AMORY. } General term, December, 1873. Before Barbour, C. J., Curtis and Van Vorst, J. J.

BARBOUR, C. J.

The act of 1866, like its predecessor of 1789, invests a party who is entitled to the benefit of its provisions with a tremendous power—the power of ousting a high court of a sovereign State of all jurisdiction, without its own consent, or even interpositions. For upon the
55 failing of the petition and other papers required by the act, the State court is ipso *es* instanti, wholly and forever divested of its jurisdiction, and the action must thenceforth proceed, if at all, before a tribunal of another and different government. So extraordinary a power and operating such consequences, it is easy to see, can be exercised only upon and by the most strict, literal, and perfect compliance with every provision required by the act.

The statute in question was not intended for the benefit of either of the parties where both the plaintiff and the defendant are citizens of the same State, or of different States, other than that in which the action is pending, but only where the plaintiff in a case like this is a citizen of the State in which the suit is brought, and the defendant a citizen of another State. Indeed, it is the fact that the parties are thus situated in regarded to their citizenship, respectively, and nothing else, that gives authority to Congress, under the Constitution, to legislate upon the subject, and, of course, it is of the highest importance that the papers should show clearly and conclusively that the party seeking to

remove the cause is a citizen of some other State than that in which the action is brought, and that his opponent is a citizen of the latter State; and so the statute requires. In this case, however, the petition did not state that the plaintiffs either then, or when this action was brought, were residents or citizens of the State of New York without qualification or limitation, but only alleged that the suit was instituted
56 by them as executors under letters testamentary, issued to them here; and further averred that the plaintiffs, as such executors, were citizens of this State, which in effect is the mere averment of a legal conclusion that they were citizens of this State because letters testamentary had been granted to them by a surrogate of New York.

It is not necessary to consider whether the defendant is right in supposing that a surrogate has power thus to make a citizen. It is sufficient to say the averment, as it stands, raises a question for judicial decision, and is not this unqualified statement of the fact of citizenship which is required by the act of 1866.

The fact, too, which I understand to have been established during the progress of the action, that the plaintiffs were and still remain residents and citizens of Wisconsin, is wholly unimportant, so far as concerns the question before us.

If the requisite facts had been set forth in the petition, the cause, as we have seen, would have been removed from the jurisdiction of the court upon and by the filing of the papers, whether those facts were true or false.

The result of my conclusions is that the filing of the petition and other papers in this case did not divest the court of its jurisdiction.

The judgment should, therefore, be affirmed, with costs.

The other case between the same parties involves the same question, and the judgment therein should be affirmed, with costs.

Curtis and Van Vorst, J. J., concurred.

57 At a general term of the superior court of the city of New York held at the city hall in said city on the thirty-first day of December, 1873.

Present, Chief-Justice Barbour and Justices Van Vorst and Curtis.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS, &c., of James Amory, deceased,
vs.
PETER B. AMORY.

This cause having come on to be heard on the appeal from the judgment entered herein on the sixth day of June, 1873, and after hearing Henry C. Knox, esq., of counsel for the plaintiffs, and George E. Horne, esq., of counsel for the defendant, it is ordered that the judgment entered herein on the sixth day of June, 1873, be, and the same is hereby, affirmed, with costs to the plaintiffs.

Enter.

H. C. V. V.

58 Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased,
vs.
PETER B. AMORY.

Judgment, Feb. 4, 1874.

This cause having come on to be heard on the appeal from the judg-

ment entered herein on the sixth day of June, 1873, and the court, after hearing the argument of counsel as well for the defendant as for the plaintiffs, having ordered that said judgment be affirmed, with costs, to the plaintiffs, and the costs, disbursements, and allowances having been adjusted by the parties:

Now on motion of Henry C. Knox, esq., of counsel for the plaintiffs, it is considered ordered and adjudged that the judgment entered herein on the sixth day of June, A. D. 1874, be, and the same is hereby, affirmed. And it is further considered, ordered, and adjudged that the plaintiffs above
59 named do have and recover of and from the defendant the sum of one hundred and nineteen dollars and ninety-two cents, their costs and disbursements and allowances herein.

THOMAS BOESE, *Clk.*

60 Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased,
against
PETER B. AMORY.

Please take notice that the defendant Peter B. Amory appeals to the court of appeals from the judgment of the general term of the superior court of the city of New York in this action entered on the fourth day of February, 1874, affirming the judgment entered herein on the 6th day of June, 1873, and for the sum of one hundred and nineteen dollars and ninety-two cents disbursements and allowances in favor of the plaintiffs against the defendant, and from every part thereof.

N. Y., February 5, 1874.

To FULLERTON, KNOX & RUDD, Esqs.

Yours, &c.,

GEORGE E. HORNE,
Defts. Atty., 110 *Broadway, N. Y.*

THOMAS BOESE, ESQ.,
Clerk of the Superior Court.

61 At a special term of the suprior court of the city of New York, held at the county house in the city of New York, on the 21 day of November, in the year 1874.

Present, Hon. J. J. Freedman, justice.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, dec'd,
v.
PETER B. AMORY.

Peter B. Amory, the defendant in the above-entitled action, having appealed to the court of appeals from the judgment of the general term of this court, bearing date the 4th day of February, in the year 1874, which judgment was signed by the clerk of this court and duly entered in his office on the same day, and said court of appeals having affirmed the judgment of this court:

Now, on entering and filing the remittitur from the said court
62 of appeals, bearing date November 13, 1874, and on motion of Fullerton, Knox & Rudd, attorneys for the respondents—

Ordered, That the judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the said respondents have execution therefor.

Enter.

J. J. F.

63 N. Y. superior court.

S. B. AND JOHN AMORY, EX'RS., &C., of James Amory, deceased, *agst.* PETER B. AMORY.

Costs.		*Disbursements.*	
Term-fees	$10	Clerk's fees	1 00
Court of appeals before argument	30	Affidavits & acknowledgments	13
Court of appeals for argument	60	Certified copies, orders	10
	100	Satisfaction piece	25
Disbursements	17 53	Transcript & filing	11
		Remittitur	5 00
		Postage	25
Total	117 53	Sheriff's fee in execution	69
		Paid printing points	10 00
			$17 53

Adjusted at $117.53, Nov. 17, 1874, at 10.45 a. m.

THOMAS BOESE, *Clerk.*

CITY & COUNTY OF NEW YORK, *ss:*

Malcolm Graham, managing clerk of the attorney for the plaintiffs in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made in this action, or will be necessarily incurred therein, to the best of his knowledge & belief.

MALCOLM GRAHAM.

Sworn to before me, Nov. 14, 1874.

CHAS. W. IRVING,
Commr. of Deeds, N. Y. Co.

64 Take notice, that we shall present a bill of costs, of which the foregoing is a true copy, to the clerk of this court for adjustment, at his office in the new court-house, in the city of New York, on the seventeenth day of November, 1674, at 10½ o'clock in the forenoon of that day.

November 14, 1874.

Yours, &c.,

FULLERTON, KNOX & RUDD,
Attorneys for Plaintiffs.

To GEORGE E. HORNE, Esq.,
Attorney for Defendant.

65 *Judgment.—November* 21, 1874.

Superior court of the city of New York.

SAMUEL B. AMORY AND JOHN AMORY, EXECUTORS of the last will and testament of James Amory, deceased, *vs.* PETER B. AMORY. } No. 1.

The defendant, Peter B. Amory, having appealed to the court of ap-

peals of the State of New York from the judgment of this court, entered herein on the fourth day of February, A. D. 1874, and said court of appeals having affirmed the judgment of this court with costs of appeal, and the remittitur of said court of appeals having been duly filed with the clerk of this court:

Now, on motion of Fullerton, Knox & Rudd, attorneys for said plaintiffs, it is considered, ordered, and adjudged that the said judgment of the said court of appeals be and the same is hereby, made the judgment
66 of this court, and that the judgment entered herein on the fourth day of February, A. D. 1874, be and the same is in all things affirmed, and stands in full force, strength, and effect; and it is further considered, ordered, and adjudged that the plaintiffs above named do have and recover of and from the defendant the sum of one hundred and seventeen dollars and fifty-three cents, ($117.53,) their costs, disbursements, and allowances herein.

THOMAS BOESE, *Clerk.*

Filed Nov. 21, 1874, at 11.35 a. m.

67 N. Y. superior court.

SAMUEL B. AMORY & AN'R, *agst.* PETER B. AMORY. } No. 1.

STATE OF NEW YORK,
Superior Court, City of New York, ss:

I, Thomas Boese, clerk of the superior court of the city of New York, do hereby certify that the above and foregoing are the original writ of error and citation, with acceptance of service endorsed thereon; that the copy of the bond hereto attached is a true copy of the original on file in my office. That on the 28th day of November, 1874, the attorney for the plaintiff in error duly deposited in my office the annexed writ of error, together with a bond of which the annexed is a copy thereof, which copies were thereafter duly delivered to Messrs. Fullerton, Knox, & Rudd, the attorneys for Samuel B. & John Amory, executors, the within named defts. in error. That I have compared the annexed copy of the record and proceeding in the above-entitled cause with the originals on file and of record in my office; and that it is a true transcript therefrom, and of the whole thereof, and that I return the same to the Supreme Court of the United States, in obedience to the command
68 of the annexed writ.

In testimony whereof I have hereunto set my hand and affixed the seal of the superior court, at New York City, this 27th day of January, 1875.

[SEAL.] THOMAS BOESE, *Clerk.*

(Indorsement on cover:) No. 508. Peter B. Amory, plaintiff in error, vs. Samuel B. Amory & John Amory, as exr's of James Amory, decd. New York City sup'r court. Filed 27 March, 1875.

SUPREME COURT

OF THE

United States.

PETER B. AMORY, Plaintiff in Error,

vs.

SAMUEL B. AMORY AND JOHN AMORY as Executors, Defendants in Error.

No. 58.

Brief of Plaintiff in Error.

FACTS.

Defendants in error as exectors of the last Will and Testament of James Amory deceased, brought this action in the Superior Court of the City of New York, against the defendant to recover a large sum of money.

Their Complaint (p. 7) alleges probate of will and granting of Letters by Surrogate of New York County.

Plaintiff in error (a resident of the State of New Jersey answered the Complaint (see page 8,) and set up not only a perfect defence, but a counter claim by which he prayed judgment for a large amount.

Defendants in error replied (p. 10.) The case being at issue, plaintiff in error duly presented and filed in the Superior Court his petition for the removal of the cause into the Circuit Court, under the provisions of the Act

of Congress entitled "An Act for the removal of causes in certain cases from State Courts" approved July 20th, 1866, and the acts amendatory thereof, together with the bond provided for in said act and his affidavit as to prejudice, (see Error Book, folio 34.)

(Defendants Exhibit A, page 13.)

The sureties on the Bond were recognized by the Superior Court Justice, (see folio 47, page 17) as sufficient. Upon this the Superior Court issued an order to shew cause why the cause should not be removed.

(See folios 43, 44, page 15.)

Defendants in error appeared and contested the motion; filed a verified reply to the petition denying its statements, (see page 16) and an order was entered denying the application. (See page 17.) Subsequently judgment was entered against plaintiff in error. Plaintiff in error appearing only to object. And he appealed first to the General Term thence to the Court of Appeals, presenting to both Courts only his right to a removal. The judgment below was affirmed on such appeals and he now brings his Writ of Error to this Court.

For opinion of the General Term of the Superior Court (see page 19, 20.)

There is nothing in the case to shew whether Peter B. Amory was ever served with summons or not.

Errors relied upon by Plaintiff.

I. The Superior Court erred in maintaining jurisdiction of the case after the petition affidavit and bond with sufficient surety had been presented and filed.

II. The Superior Court erred in inquiring into any of the matters alleged in the petition for removal.

III. The Superior Court erred in not permitting the removal of the cause into the Circuit Court, so that

Plaintiff in error might have the ruling of that Court upon the merits of his application and ultimately a trial of his cause upon its merits.

IV. The judgment of the Court below is erroneous and ought to be reversed, in that it sustains the judgment and rulings of the Superior Court.

POINTS.

I.—The filing of the Petition, affidavit and Bond as required by the acts of Congress removed the cause to the United States Court. The jurisdiction of the Superior Court in this action was thereby determined, and the jurisdiction of the Circuit Court forthwith attached; and all proceedings thereafter in the State Court were *Coram non judice.*

Act of Congres, July 27th, 1866.
" " " March 2d, 1867.
Stevens *v.* Pheonix Ins. Co., 41 N. Y., 149.
Roberts *v.* Nelson, 40 How., Pr. R., 387.
Utretque *v.* D'Arbel, 9 Peters, 692.
Gordon *a.* Longstreet, 16 Id., 97.
Kanouse *v.* Martin, 15 How., U. S. R., 198.
Walker *v.* Walker, 9 Wall., 743, 752.
Coal Co. *v.* Blatchford, 11 Wall., 172.
Fiske *v.* Pacific P. R., 6 Blatch., 362, see page 380.
Hatch *v.* R. R., Id., 105.
Report of Commisioners appointed under Act of Congress, Jnne 27th, 1866, to revise statutes 14, S. at L., 306.
Amory *v.* Amory, 18 Int. Rev. Rec., 140. (7th Wis., Circuit.)

Home Ins. Co. *v.* Morse, U. S. Supreme Court, October, 1874.
Constitution of the U. S., Art. 1, § 8, Sub., 17.
Art. 3, § § 1, 2, Art. 4 § 2, Sub., 1.
Art. 6, Sub., 2, Art. 14, S., 1.

The issuing of the order to shew cause on the filing of these papers and subsequent enquiry and order conferred no new jurisdiction.

The jurisdiction as to any and every controversy in the suit was alone in the United States Circuit Court.

Home Ins. Co. *v.* Morse and others above cited.
Bell *v.* Dix, 49 N. Y., 232.

"One great object in the establishment of the Courts "of the United States and regulating their jurisdiction "was to have a tribunal in each state *presumed to be free* "*from local influence*, and to which *all* who are non-resi- "dents or aliens might resort for legal redress, but this "object would be defeated if a State Judge in the exer- "cise of his discretion may deny to a party entitled to it, "a removal of his cause."

Kanouse v. Martin, above cited.

"There can be no doubt that the United States Cir- "cuit Court had a right to examine and decide for itself "upon the grounds. * * *

"*That the Court had the right to decide upon its own "jurisdiction and remand the case if sufficient grounds for "removal were not shewn.*" Thompson, *J.*

Utretque *v.* D'Arbel, 9 Pet., 692.
11 Curt., U. S. S. C., 352.

"The Legislature of a State cannot deprive a citizen

"of another State of his legal or equitable rights under "the constitution and laws of Congress by declaring in "what Courts they must be enforced."

Amory *v.* Amory, above cited.

The statute requires only that the non-resident party shall file his petition, &c.; no facts are required to be stated in it; the affidavit accompanying must state that "from prejudice or local influence," &c.

See Statute.

The petition need not be verified.

1, Dill., 73.

The order removing cannot be reviewed.

Akerly *v.* Velas, 1 Abb., U. S., 284.

II.—The Superior Court assumed jurisdiction upon facts not before it on the application for removal.

III.—It is a grave question whether under the provision of the Federal Constitution all State Legislation vesting local Courts with jurisdiction in actions between citizens of different States is not void, and if this is so, will the highest appellate tribunal so construe defective legislation as to vest these local Courts with jurisdiction,—questionable at best;—and most dangerous to the rights of the citizens in its effects.

See articles of Constitution, cited.

Amory *v.* Amory, above cited.

See Constitution, Article XV.

IV.—And it cannot be urged that Plaintiff in error gave to the Superior Court in this case by voluntary appearance and answer.

The sequel shews his intention, to have availed himself of his right of trial and appeal before the Federal jurisdiction, and the course of the State

Court deprives him of his right to a trial of this action on its merits. While at the time his petition was filed the Federal Courts had, without disent, affirmed his right to a removal and to have the Federal Court determine as well *his right to removal*, as all other questions.

The Federal Court on enquiring into the questions and determining that right would still give him the opportunity to be heard in his defence. By the course pursued he is deprived of that right, his right to defend, or to a recovery on his counter claim is gone and he is without remedy except the judgment be reversed.

V.—It was the intention of Congress that the petition should remove the cause, else why the Bond?

The Bond saves the other side from damage. If the party have not the right to remove the Federal Court may remand and the Bond stands for damages

See Chamberlain *v.* American, L & T. Co.
N. Y. Supreme Ct., Gen'l T., first.
N. Y. Weekly Dig.

VI.—While state Courts may justly zealously protect themselves against infringment, to Congress alone is delegated the power of regulating the relations of citizens of different states to each other; and while the state may desire to maintain jurisdiction of an alien or citizen of another state, *ought he* to be circumscribed or defeated of his legal right to have his legal controversies with citizens of other states in the Court to which they legally and naturally go, rather than in Courts of limited and local jurisdiction into the jurisdiction of which accident or chance may temporarily bring his person or property and where he may never come again.

See N. Y. Code of Procedure. § § 33, 124.

VII.—Whatever may be urged by the Plaintiff in error in support of the jurisdiction of the local Courts in this case, it cannot be denied that this Court, as well as the local Court or the Circuit Court, must—in order to pass upon the question—stop and enquire as to whether, in fact, or by reason of peculiar Statutory provisions, the Defendant in error *are* or *are not* citizens of the State of New York. Legal decisions in other states do not aid in determining this fact. While Plaintiff does not avoid that issue here or elsewhere; the fact that controversy *is* raised demonstrates that there was something raised by the Petition for the Circuit Court to try and determine; and that the Superior Court exceeded its jurisdiction in assuming to determine it. (See answer to Petition, p. 16, Error Book.)

That question is not now before this Court. The only question here is that raised by our first point.

VIII.—The judgment is erroneous and ought to be reversed.

W. T. BIRDSALL,
Attorney for Plaintiff in Error.

W. R. BEEBE,
Of Counsel.

Supreme Court of the United States.

No. 58.—October Term, 1877.

PETER B. AMORY, Plaintiff in Error,

vs.

SAMUEL B. AMORY and JOHN AMORY, Executors of James Amory, Deceased, Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

This is a writ of error to the Court of Appeals of the State of New York. The suit was brought in the Superior Court of the city of New York, by Samuel B. and John Amory, Executors, &c., against Peter B. Amory, on a promissory note executed to the testator. The plaintiffs are citizens of the State of Wisconsin, and Peter B. Amory, a citizen of New Jersey. The defendant, Peter B. Amory, answered the complaint in the Superior Court, (Record, p. 8,) and issue was joined thereon October 19, 1870. (Record, p. 10.)

May, 1837, Peter B. Amory, the defendant, applied to said court to change said cause to the Circuit Court of the United States; and the court, upon the petition and bond offered by the said Peter B. Amory, ordered the plaintiffs to show cause, on the 5th day of May, 1873, why the suit should not be removed to the Circuit Court of the United States. (Record, p. 13.)

Cause was shown, and the rule was discharged. (Record, p. 17.) Afterwards the case was tried, and judgment was

rendered for the plaintiffs on the note, June 6, 1874. (Record, pp. 18 and 19.)

The defendant, Peter B. Amory, by appeal, carried the cause to the Court of Appeals of the State of New York; claiming that the court erred in denying a removal of the cause to the Circuit Court of the United States. But the Court of Appeals unanimously affirmed the judgment; but evidently regarding the appeal as vexatious, delivered no opinion.

Amory *et al. v.* Amory, 58 New York, 684.

The cause was remitted from the Court of Appeals to the Superior Court of New York, when final judgment was entered on the remittitur, to reverse which judgment this writ of error is prosecuted.

I.

The only point in this case is, whether the State court erred in not transmitting the cause to the Circuit Court on the petition of Peter B. Amory. The petition (Record, p. 13) shows that the defendant, Peter B. Amory, was a citizen of the State of New Jersey, but fails to show the citizenship of the plaintiffs in that suit. The allegation is, that the plaintiffs were executors under a will admitted to probate in the State of New York, and that letters testamentary had been issued to them; and "that said plaintiffs, *as such executors*, are citizens of the State of New York." In the *jurat* to the petition, it is stated "that the above-named plaintiffs are, under and by virtue of the laws of the State of New York, citizens of the State of New York." (P. 14.) On the return of the rule to show cause, the fact was shown affirmatively that the executors were citizens and residents of the State of Wisconsin.

There is no such thing as citizenship, depending upon State appointments or State laws. Art. 14, Amendments to Constitution of the United States, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside.*"

And this was the settled law long before this amendment was adopted. Such an allegation of citizenship would not be sufficient to give jurisdiction of suit brought in the Circuit Court of the United States.

Dodge *v.* Perkins, 4 Mason, 437.
Childress *v.* Emory, 8 Wheaton, 642.
Custer *v.* Treadwell, 3 Story, 25.

There must be a distinct allegation that the party—that is, the individual—is a citizen of the State, or that he is a citizen of the United States, and a resident of the State.

Again, the petition is further defective, in not alleging citizenship of the parties at the time the suit was commenced. The allegations of the petition relate only to citizenship at the time of filing the petition, more than a year after suit was commenced.

Holding *v.* Ins. Co., 46 New York, 5.

II.

This is a proper case for the allowance of damages, under the rule of this court. This writ of error was manifestly prosecuted for mere delay.

MATT. H. CARPENTER,
FULLERTON, KNOX & CROSBY,
Of Counsel for Defendants in Error.